

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: June 1, 2018

CLAIM NO. 201666854

PIKE COUNTY FISCAL COURT

PETITIONER

VS.

**APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

TERRY PINION
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Pike County Fiscal Court ("Pike County") seeks review of the December 26, 2017, Opinion, Order, and Award of Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ") finding Terry Pinion ("Pinion") sustained a work-related injury on September 26, 2016, and is totally occupationally disabled as a result of the injury. In awarding permanent total disability ("PTD") benefits, the

ALJ applied the tier-down provision contained in the 1994 version of KRS 342.730(4). The ALJ awarded 12% interest on all unpaid income benefits due on or before June 28, 2017, and 6% interest on all unpaid benefits due on or after June 29, 2017. Pike County also appeals from the February 8, 2018, Order denying its petition for reconsideration.¹

On appeal, Pike County challenges the award on three grounds. First, it contends the ALJ's determination of total occupational disability is erroneous as the evidence indicates Pinion was intelligent, articulate, and capable of returning to work performing a job requiring less physical exertion. Thus, the ALJ should have awarded permanent partial disability benefits. Second, Pike County asserts the ALJ erred in awarding 12% interest on all unpaid income benefits due on or before June 28, 2017. It argues the ALJ should have awarded 6% interest on all unpaid income benefits. Finally, Pike County asserts the ALJ erred in imposing the tier-down provision of KRS 342.730(4) as set forth in the 1994 version of that statute. Pike County concedes the Kentucky Supreme Court in Parker v. Webster County Coal, LLC (Dotiki Mine), 529

¹ The ALJ sustained Pinion's petition for reconsideration without objection by Pike County and amended the award to correct some typographical errors.

S.W.3d 759 (Ky. 2017) found KRS 342.730(4) enacted in 1996 is unconstitutional. It concludes with the following: "While it is recognized that the Board is bound by the Supreme Court's majority Opinion in *Parker v. Webster Coal*, the argument of the dissenting Opinion in that case is preserved." Finding no error, we affirm.

Pinion, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Pinion was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the

evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's

role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Pinion testified at an October 3, 2017, deposition and at the October 24, 2017, hearing. During his deposition, Pinion described the September 26, 2016, event as follows:

Q: And can you tell me a little bit about how this happened, what you were doing and what you felt?

A: I was installing an axle in the rear of a Mack truck on the landfill.

Q: Okay. And then what happened while you were doing that?

A: I laid it to my right side, and I reached around to pick it up, and it probably weighs close to fifty (50 pound [sic]; and, when I twisted around to pick it up to install it, I was down on my knees, and I hurt my back.

Q: And we're talking about your low back here?

A: Yes.

At the time of the injury, Pinion was 58 years of age. He is a high school graduate and has only held two full-time jobs during his lifetime. Pinion testified he began working for Ohio Carpenters in 1977 as a mechanic and

welder. He worked out of the union hall in Huntington, West Virginia until 1998. All of his work was limited to working on commercial projects. He was a carpenter and pile driver which also entailed welding. He began working for Pike County on February 15, 1999, as a mechanic and welder. In that job, he repaired all of Pike County's equipment including heavy equipment. He performed more welding than repair work. Pinion was hired because he was a certified welder. He has been certified as such for 35 years. He performed welding on all of Pike County's equipment. He earned \$18.86 an hour working 40 hours weekly. He has not worked since the injury.

After the injury, he was treated at South Williamson Appalachian Regional Hospital's emergency room. He has been treated by his family physician, Dr. Somasundaram. He was referred to Dr. Densler who recommended he have "three (3) discs fused together."² At the time of his deposition, Pinion was taking Cyclobenzaprine and Tramadol for his back problems. He was also applying Biofreeze. He sees Dr. Somasundaram every three months. At the time of his deposition, he was experiencing severe numbness and tingling in his right hip,

² The first names of Drs. Somasundaram and Densler was not provided.

groin, and leg. He testified his back hurts constantly and he is unable to lift. He believes his condition has worsened since the injury. He denied sustaining any prior injuries or undergoing prior treatment of his low back.

At the hearing, Pinion explained he performed all of the mechanic work and welding on Pike County's heavy equipment and vehicles. As a result, he constantly lifted 50 to 100 pounds. He described some of the items he lifted as brake drums, big wheels, and tires. The equipment upon which he welded included buckets of excavators, backhoes, and end loaders. His entire job entailed physical labor. Pinion testified that he worked as a carpenter on commercial jobs. He carried as many as four sheets of plywood without help.

Pinion continues to have severe low back pain and numbness and tingling in the groin area. The right groin and hip pain waxes and wanes; however, his lower back pain is almost constant. Pinion is able to sit for approximately thirty to forty minutes but has to be able to get up and move around during that time. He estimated he walks 200 to 300 feet without any problems. Pinion is unable to lift a 5-gallon gasoline can. He explained that on one occasion he experienced symptoms for three to four days after lifting a gas can. He uses an ice pack, a heating pad, and a TENS

unit to help with his lower back pain. Pinion explained why he believes he is unable to perform either of his past jobs:

A: Well, all the jobs I've done in my forty-two years of service, I believe it was, it's all manual - You know, I've never had an easy job.

Q: Yeah.

A: I have never been able to sit, but ... which my welding - I welded about thirty-five years and that consisted of a lot of sitting but, you know, you have to bend over so far where you have to get up in under a piece of equipment and you've gotta stay raised up to try to do that procedure ...

Q: Um-um.

A: ... and I don't believe I could continue doing that, so -

Q: The welding, I assume you did all that when you were doing the carpentry type stuff and bridges and all that type of thing?

A: Yeah. I welded all ... ten, twelve hours a day.

Pinion is also unable to care for his yard:

A: Well, when I first got hurt - I've got two banks where I live, my home, and a little ol' flat place, and I kept all that upkeep of that. And now since my work-related injury, I cannot use a weed-eater. I hire my two banks mowed, but I've got a little ol' level place and it takes about twenty minutes to mow it with a - I've got a little ol' small cushion mower and I mow that little level place. It takes probably

twenty minutes. What time my wife don't mow it, but now most of the time she works, I ... I'm ... I try to keep it mowed. I mow it onced [sic] a week.

Q: What happens when you do that?

A: Well, a lot of times after I do that, I'll go in and run me a good hot tub of water and sit in it fifteen or twenty minutes.

Q: Okay. So, basically, when your pain or whatever flares up, at this point you have to go in and relax or sit down or do something like that?

A: Yes.

At the time of the hearing, Pinion was taking Tramadol, Ibuprofen, and a steroid, the name of which he could not recall. He testified his day consists of sitting on the porch and laying around on the couch watching television. He does no household chores. He used to squirrel hunt but now does not. As a result, he has sold all but two of his hunting dogs.

Pike County introduced the Independent Medical Evaluation report of Dr. Gregory Snider dated May 5, 2017. The report reflects Dr. Snider received a history, conducted an examination, and reviewed various medical records. Dr. Snider concluded Pinion attained maximum medical improvement as of January 17, 2017. He assessed a 7% impairment rating based on the 5th Edition of the American Medical Association, Guides to the Evaluation of

Permanent Impairment ("AMA Guides"). He recommended Pinion consistently engage in home exercises and a stretching program. Pinion had permanent restrictions including a 25-pound lifting limitation, no repetitive bending or lifting, and position change as needed.

Pinion introduced the March 22, 2017, report of Dr. David Muffly. After performing an examination and reviewing medical records and imaging films, Dr. Muffly assessed a 7% whole person impairment pursuant to the AMA Guides due to the September 26, 2016, injury. His diagnosis was:

Chronic lumbar strain with right L5-S1 disc protrusion causing chronic low back pain due to the 9-26-2016 injury. Pre-existing advanced L5-S1 degenerative disc disease. He has multiple level lumbar degenerative disc disease most pronounced at L5-S1. He has pseudo radicular symptoms but I do not detect nerve root impingement.

Dr. Muffly concluded Pinion could not return to his previous occupations. He imposed permanent restrictions of lifting no greater than 25 pounds and avoiding bending, stooping, kneeling, climbing, and overhead reaching.

In finding Pinion to be totally occupationally disabled, the ALJ provided the following findings of fact and conclusions of law:

The evidence is undisputed that Pinion has sustained 7% whole person impairment. Both Dr. Muffly and Dr. Snider found Pinion sustained an injury to his L5-S1 disc and a 7% impairment as a result of the work injury on September 26, 2016.

Based on the undisputed evidence, the ALJ finds Pinion sustained 7% whole person impairment as a result of his September 26, 2016 work injury.

The ALJ finds Pinion is entitled to permanent total disability (PTD). Pursuant to *Osborne v. Johnson*, 432 S.W.2d 800 (KY 1968), the ALJ must evaluate the post-injury physical, emotional, intellectual, and vocational status when determining entitlement to PTD. When determining entitlement [sic] PTD or total occupational disability, restrictions due to non-work related conditions cannot be considered. *City of Ashland v. Stumbo*, 461.S.W.3d 392 (KY 2015).

The opinions of both Dr. Muffly and Dr. Snider prevent Pinion from returning to either of his prior occupations. Dr. Muffly specifically opined that Pinion could not return to his prior occupation with Pike County. Dr. Muffly's permanent restrictions prevent Pinion from returning to his prior work in construction. Dr. Muffly restricted Pinion to 25 pounds maximum lifting and restricted him to avoid kneeling, climbing and overhead reaching. Similarly, Dr. Snider restricted Pinion to 25 pounds lifting, no repetitive bending or lifting, and positional change as needed. Based on Pinion's description of his work activities, Dr. Snider's restrictions would also prevent him from returning to either of his prior occupations.

Pinion is fifty-nine years old. He is [sic] high school graduate. Pinion's entire work history has consisted of two different jobs requiring heavy manual labor. Pinion has worked in construction and as a mechanic and welder. Although his restrictions may allow him to work at the light or sedentary level of work, he is fifty-nine (59) years old and has no transferable skills to light work. The ALJ finds it highly unlikely that a fifty-nine (59) year old with only experience in manual labor jobs and no skills transferable to light work would be able to find work consistently under normal employment conditions. Further, the ALJ finds Pinion's testimony to be credible in all aspects and as such finds it unlikely that Pinion would be able to maintain consistent employment in a competitive labor market.

Based on the foregoing, Pinion is permanently and totally disabled and is entitled to PTD benefits.

We find no merit in Pike County's first argument as the opinions of Drs. Snider and Muffly and the testimony of Pinion constitute substantial evidence supporting the determination Pinion is totally occupationally disabled as a result of the September 26, 2016, injury. Significantly, the doctor's opinions are almost identical. However, Dr. Muffly concluded Pinion cannot return to his previous occupations.

In McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001), the Supreme Court

directed that in determining whether an injured worker is totally occupationally disabled the following analysis is required:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, *Osborne v. Johnson, supra*, at 803.

The Supreme Court also directed one of the functions of the ALJ is to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must consider the worker's medical condition when determining the extent of his occupational disability, the ALJ is not necessarily required to rely

upon the medical evidence. Further, "a worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)."

Pinion has only performed two jobs during his vocational lifetime and it is undisputed both jobs involved heavy manual labor. Thus, the ALJ could reasonably conclude from the medical restrictions that Pinion was not capable of returning to either job. Dr. Muffly explicitly stated Pinion was not capable of performing his previous jobs. Pinion's testimony confirms that. Thus, the opinions of the doctors and Pinion amply support the conclusion Pinion is totally occupationally disabled.

In determining Pinion was occupationally disabled, the ALJ performed the analysis required by McNutt, supra. As stipulated by the parties, the ALJ found Pinion sustained a work-related injury. Relying upon the opinions of both doctors, she found Pinion sustained a 7% whole person impairment rating as a result of the work-related injury of September 26, 2016. The ALJ then determined Pinion was unable to perform any type of work and was totally disabled as a result of the work injury. In doing so, the ALJ concluded the doctors' restrictions prevented him from returning to either of his former jobs.

Pinion's age, education level, work history, and physical restrictions, led the ALJ to conclude he was not capable of performing light or sedentary work. Significant to the ALJ was the fact Pinion was 59 years of age and possessed no transferrable skills permitting him to perform light work. Thus, the ALJ concluded it was unlikely that Pinion, who only performed heavy manual labor and had no transferrable skills to permit light duty work, would not be able to find work consistently under normal employment conditions. The ALJ found all portions of Pinion's testimony credible in concluding he was unable to maintain consistent employment in a competitive labor market. As noted in McNutt, supra, Pinion's testimony alone constitutes substantial evidence supporting the finding of total occupational disability. Since substantial evidence supports the ALJ's decision, her determination Pinion is totally occupationally disabled will not be disturbed.

We find no merit in Pike County's assertion the ALJ erred in awarding 12% interest on all paid income benefits due on or before June 28, 2017. We previously addressed this issue in Lawnco, LLC v. White, Claim No. 2014-69882, rendered January 12, 2018, holding as follows:

We previously addressed this issue
in Limb Walker Tree Service v. Ovens,

Claim No. 201578695, Opinion rendered December 22, 2017, holding as follows:

In Stovall v. Couch, supra, the Court of Appeals resolved the very issue raised by Limb Walker on appeal. Couch was determined to be totally occupationally disabled due to coal workers' pneumoconiosis ("CWP"). The issue on appeal was whether the Board erred in awarding interest at the rate of 12% on all past due benefits. On the date of last injurious exposure to CWP the statute allowed 6% interest on unpaid benefits. However, the statute was subsequently amended effective July 15, 1982, increasing the interest rate to 12% per annum on each installment from the time it is due until paid. In determining the employer owed 6% interest on all past due installments through July 14, 1982, and 12% on all unpaid installments thereafter, the Court of Appeals concluded as follows:

On this appeal, appellants contend that KRS 342.040, governing the rate of interest on past due installments, was misapplied. On the date of last injurious exposure, that statute allowed 6% interest on such benefits. However, the provision was amended, effective July 15, 1982, increasing the rate of interest to 12% per annum on each installment *from the time it is due* until paid. To uphold the Board's award would amount to retroactive application of the amendment, appellants contend.

As this particular application of KRS 342.040

has yet to be the topic of an appellate decision, both sides in this controversy look for analogy to the case of *Ridge v. Ridge*, Ky., 572 S.W.2d 859 (1978). *Ridge* dealt with the application of an amendment to the statute governing the legal rate of interest on judgments. The Kentucky Supreme Court decided:

... to adopt the position that the rate of interest on judgments is a statutory rather than a contractual matter. We therefore hold that the increase of the legal interest rate applies prospectively to prior unsatisfied judgments, the new rate beginning with the effective date of the amendment. *Id.* at 861.

Appellants assert that, employing the logic of *Ridge*, the 12% rate of interest should begin on the effective date of the statutory amendment, July 15, 1982, and that prior to that date, interest should be 6% as per the old statute. Appellee Couch looks to the language in *Ridge*, namely that the new rate of interest "applies prospectively to prior unsatisfied judgments," thus concluding that the rate of interest is controlled by the date of judgment and not the date of accrual of the cause of action, and that the 12% rate in effect upon the date of judgment is applicable.

In *Campbell v. Young*, Ky., 478 S.W.2d 712, 713 (1972), the then Court of Appeals discussed the question of when interest was to begin accruing on unpaid compensation benefits. That court held that interest was due from the date *the claim for compensation was filed*. In the instant case, when Couch filed his claim, the interest rate in effect was 6% per annum. In our opinion, the plain wording of KRS 342.040 dictates that appellants may only be assessed interest on unpaid benefits at 6% prior to July 15, 1982, and at 12% thereafter. Consequently, the Board's award to the contrary and the lower court's affirmation thereof was in error.

Id. at 437-438.

The same logic applies in the case *sub judice*. Ovens' entitlement to PPD benefits vested at the time of the injury. Thus, as of the date of injury and up through June 28, 2017, Ovens is entitled to 12% interest on all past due benefits. Ovens is entitled to 6% interest on income benefits accrued from and after June 29, 2017.

In *Hamilton v. Desparado Fuels, Inc.*, 868 S.W.2d 95, 97 (Ky. 1993), the Supreme Court instructed:

Accordingly, we believe that what constitutes an authorized attorney's fee for prosecuting a claim for those particular benefits also should be determined by the

law in effect on the date of the injury. A contract that provides otherwise is void. KRS 342.320(2).

KRS 446.080(1) provides that statutes are to be liberally construed in order to promote their objectives and the legislative intent, and KRS 446.080(3) provides that no statute is to be applied retroactively absent an express legislative directive. In *Peach v. 21 Brands Distillery*, Ky. App., 580 S.W.2d 235 (1979), the court emphasized that the rule against the retroactive application of statutes should be strictly construed. Particularly where a statute creates new rights or duties, it should be presumed that the legislature intended for the statute's application to be prospective only. The 1990 amendment to KRS 342.320(1) exposes injured workers to liability for substantially greater attorney's fees in relation to the size of their awards than was authorized at the time the maximum amount of the award was fixed. We find no indication, whatever, that the legislature intended for the 1990 amendment to KRS 342.320 to apply retrospectively to awards of attorney's fees relative to injuries which occurred before its effective date.

As we find no indication, express or implied, the legislature desired the recent amendment to have retroactive

effect, the decision of the ALJ as to the applicable interest rate will be affirmed.

. . .

The language contained in Section 5 of HB 223 does not provide any support for the premise that unpaid benefits due prior to June 29, 2017, bear interest at the rate of 6%. Rather, we conclude Section 5 of HB 223 denotes that any awards entered on or after June 29, 2017, shall contain a provision that any unpaid benefits generated on or after June 29, 2017, bear interest at the rate of 6% per annum. There is nothing in Section of HB 223 which mandates that income benefits due prior to June 29, 2017, bear interest at the rate of 6% per annum. More importantly, Section 5 is not contained in the actual amendment of KRS 342.020. As directed by KRS 446.080(3), no statute shall be construed to be retroactive unless expressly so declared. There is no language in the amended statute containing an express provision that the applicable interest has retroactive application.

. . .

Lawnco argues the statute should be interpreted in a manner that avoids an absurd or unreasonable result. However, that argument cuts both ways, as Lawnco's interpretation of the statute would require an award entered on June 28, 2017, to direct all unpaid benefits bear interest at 12% per annum. However, the next day, the ALJ would then be required to reduce the interest on all unpaid benefits to 6% per annum. This would be an absurd and unreasonable result.

Contrary to Lawnco's assertion, Stovall, supra, resolves the issue before us. In our view, the language contained in Section 5 of HB 223 does not compel the result Lawnco seeks, especially since the language is not in the present version of KRS 342.040. Consequently, we find no distinction between the facts in Stovall, supra, and the case *sub judice*.

We also find no merit in Lawnco's assertion the amendment to KRS 342.040 is remedial. Peabody Coal Co. v. Gossett, supra, relied upon by Lawnco, is not insightful as the Supreme Court merely determined the 1987 amendment to KRS 342.125 relating to reopenings applied to awards entered before October 26, 1987, the effective date of the amendment. Peabody Coal Co. v. Gossett, supra, did not address a change in income benefits or the interest rate to be paid on those benefits.

In Kentucky Ins. Guar. Ass'n v. Jeffers, supra, the Supreme Court provided the following guidance for determining whether a statute was remedial and, thus, to be applied retroactively:

Thus, the judicial determination of whether a statutory amendment should be applied retroactively involves a two-step inquiry: (1) Is the amendment limited to the furtherance, facilitation, improvement, etc., of an existing remedy; and (2) If so, does it impair a vested right. If the statute in question only serves to facilitate the remedy, and if no vested

right is impaired, the amendment in question is then properly applied to preexisting unresolved claims if such application is consistent with the evident purpose of the statutory scheme.

Id. at 610.

The answer to the first question in this case is negative, as the amendment does not further, facilitate, or improve an existing remedy. Rather, it changes the interest rate on all benefits due and owing prior to June 28, 2017. Consequently, retroactivity would impair and carve into an existing remedy. As we noted in Limb Walker Tree Service v. Ovens, supra, a worker's entitlement to income benefits vests at the time of the injury. Pursuant to Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009), absent extraordinary circumstances, income benefits vest at the time of the injury. Thus, a change in the interest rate to be paid on the past due income benefits due prior to the effective date of the amendment adversely effects an injured worker's remedy by decreasing the interest on past due benefits.

Concerning Lawnco's reference to the amendments of KRS 360.010 and KRS 360.040, we believe there is a clear distinction between the amendments of those statutes when compared to the amendment of KRS 342.040.

KRS 360.010 changes the legal rate of interest as of June 29, 2017. It does not attempt to change the interest rate prior to that. Further, the amendment to KRS 360.040 indicates that judgments entered on or after June 29,

2017, bear interest at the legal rate of 6%. As a general rule, a judgment for monetary damages states interest is to be paid from the date of judgment and not from the date of the successful party's injury. Therefore, the only interest due from and after the date of judgment is affected.

The second question put forth in Kentucky Ins. Guar. Ass'n v. Jeffers, supra, asks whether retroactivity of KRS 342.040 impairs a vested right. The answer is unquestionably "yes" as the impaired worker loses 6% interest on income benefits to which he is entitled as those benefits vest at the time of the injury. In fact, the interest to which the injured worker is entitled is cut in half should we determine retroactivity is appropriate. In any case, a 50% reduction in interest to be paid on past due income benefits is an impairment of a vested right. Applying the test in Kentucky Ins. Guar. Ass'n v. Jeffers, supra, to the facts in the case *sub judice* leads to the conclusion retroactivity of the statute does not serve to facilitate an existing remedy. Rather, retroactivity impairs the worker's remedy while also taking away a vested right to interest. The amendment to KRS 342.040 is not remedial.

The ALJ did not err in the award of interest on past due income benefits.

We previously addressed Pike County's third argument concerning the imposition of the tier-down provision of the 1994 version of KRS 342.730(4). In Pickett

v. Ford Motor Co., Claim No. 2015-01910, rendered February 16, 2018, we held as follows:

In Parker, supra, the Kentucky Supreme Court concluded the manner in which income benefits were limited in the 1996 version of KRS 342.730(4) is unconstitutional. In so ruling, the Supreme Court stated, in part, as follows:

[T]he equal protection problem with KRS 342.730(4) is that it treats injured older workers who qualify for normal old-age Social Security retirement benefits differently than it treats injured older workers who do not qualify.

As Justice Graves noted in his dissent in *McDowell*, "Kentucky teachers ... have a retirement program and do not participate in social security." 84 S.W.3d at 79. Thus, a teacher who has not had any outside employment and who suffers a work-related injury will not be subject to the limitation in KRS 342.730(4) because that teacher will never qualify for Social Security retirement benefits. There is no rational basis for treating all other workers in the Commonwealth differently than teachers. Both sets of workers will qualify for retirement benefits and both have contributed, in part, to their "retirement plans." However, while teachers will receive all of the workers' compensation income benefits to which they are entitled, nearly every other worker in the Commonwealth will not. This disparate treatment does not accomplish the goals posited as the rational bases for KRS 342.730(4). The statute does prevent duplication of benefits, but only for non-teachers because, while nearly every other worker is foreclosed from receiving "duplicate benefits," teachers are not.

Id. at 768 (emphasis added).

The Supreme Court determined the 1996 version of KRS 342.730(4) does not pass constitutional muster because it treats injured older workers in the Commonwealth who *do not* qualify for old-age Social Security benefits, such as teachers, differently from all other injured older workers in the Commonwealth who qualify for old-age Social Security benefits. That said, the Supreme Court's pronouncement in Parker lacks guidance as to how income benefits should now be calculated for injured older workers. In other words, should income benefit calculations for injured older workers be devoid of any age-related restrictions or should income benefit calculations revert back to the previous version of KRS 342.730(4) immediately preceding the 1996 version? Having had another opportunity to offer guidance in Cruse v. Henderson, Not To Be Published, 2015-SC-00506-WC (December 14, 2017), the Supreme Court declined. Thus, this Board must turn to other sources in order to address this inquiry.

The previous version of KRS 342.730(4) reads as follows:

If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday.

The above-cited language does not induce the same constitutional quandary identified by the Parker Court, as the tier-down directed in the previous version of KRS 342.730(4) does not differentiate between injured older workers eligible for old-age Social Security benefits and those who are not. All workers injured before the age of sixty-five are subject to the tier-down provisions regardless of their eligibility for Social Security benefits. The previous version of KRS 342.730(4) does, however, differentiate between injured younger workers and injured older workers, because those injured above the age of sixty-five are not subjected to the tier-down. The Parker Court has already addressed the rational basis of providing for such a distinction:

The rational bases for treating younger and older workers differently is: (1) it prevents duplication of benefits; and (2) it results in savings for the workers' compensation system. Undoubtedly, both of these are rational bases for treating those who, based on their age, have qualified for normal Social Security retirement benefits differently from those who, based on their age, have yet to do so.

Id. at 768.

However, there must be a determination of whether the Supreme Court's pronouncement in Parker revives the previous iteration of KRS 342.730(4).

KRS 446.160 states as follows:

If any provision of the Kentucky Revised Statutes, derived from an act that amended or repealed a pre-existing statute, is held unconstitutional, the general repeal of all former statutes by the act enacting the Kentucky Revised Statutes shall not prevent the pre-existing statute from being law if that appears to have been the intent of the General Assembly.
(emphasis added).

In making an educated assessment of the legislative intent at the time the current version of KRS 342.730(4) was enacted in 1996, we turn to a contemporaneous provision, contained in the 1996 legislation, in which the legislature addressed the dire need to preserve the long-term solvency of the Special Fund, now the Division of Workers' Compensation Funds, which reads as follows:

Section 90. The General Assembly finds and declares that workers who incur injuries covered by KRS Chapter 342 are not assured that prescribed benefits will be promptly delivered, mechanisms designed to establish the long-term solvency of the special fund have failed to reduce its unfunded competitive disadvantage due to the cost of securing worker's vitality of the Commonwealth's economy and the jobs and well-being of its workforce. Whereas it is in the interest of all citizens that the provisions

of this Act shall be implemented as soon as possible, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

The language of Section 90 indicates the legislature, at the time the 1996 version of KRS 342.730(4) was enacted, intended to preserve the solvency of the Special Fund. Indeed, the language used in Section 90 speaks to this intent as being "an emergency." This legislative intent cannot be ignored in the wake of the Supreme Court's determination the 1996 version of KRS 342.730(4) is unconstitutional. This expressed concern certainly bolsters the conclusion the legislature contemplated a revival of the tier-down provisions in the previous version of KRS 342.730(4).

Accordingly, we hold that income benefits are to be calculated pursuant to the tier-down formula as set forth in the pre-existing version of KRS 342.730(4) in place when the statute in question was enacted in 1996. As the record indicates Pickett was sixty at the time of the July 13, 2015, injury to his left shoulder, and the ALJ awarded PPD benefits commencing on July 13, 2015, we vacate the ALJ's award of PPD benefits which are "subject to the limitations set forth in KRS 342.730(4)" and remand for a revised calculation of PPD benefits and an amended award consistent with the views set forth herein.

We have continued to adhere to our decision in Pickett, supra, since its rendition. The ALJ's award of

income benefits subject to the tier-down provisions contained in the 1994 version of KRS 342.730(4) will be affirmed.

Accordingly, the December 26, 2017, Opinion, Order, and Award and the February 8, 2018, Order overruling Pike County's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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